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UNITED NATIONS CONFERENCE ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE

FIRST COMMITTEE

SUMMARY RECORD OF THE 16th MEETING

Held at the Austria Center Vienna,
on Friday, 12 April 1991, at 2.30 p.m.

Chairman: Mr. BERAUDO (France)

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The meeting was called to order at 2.40 p.m.

CONSIDERATION OF ARTICLES 1 TO 16 AND 20 OF THE DRAFT CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE (agenda item 3) (continued) (A/CONF.152/5, 6, 7 and Add.1 and Add.1/Corr.1 and Add.2)

Articles 1, 2 and 15 (continued) (A/CONF.152/C.1/L.7, L.19, L.61)

1. Mr. RUSTAND (Sweden), speaking in explanation of vote concerning the amendment made at the previous meeting to article 15, said that the Committee had taken a retrograde step in deciding to delete the words "or derived from". The result was to cast doubt on the effect of international conventions in countries which, without ratifying them, had incorporated their main provisions into domestic law. For instance, although Sweden had not ratified the Convention relating to the Carriage of Passengers and their Luggage by Sea, its domestic maritime law was based on the principles of that Convention. The original wording of article 15 clearly subordinated national to international law. As a result of the Committee's decision, however, courts dealing with the rights and duties relating to the carriage of goods would be unable to take due account of relevant national laws derived from international transport conventions.

2. The CHAIRMAN said that the Committee now had three options for the last sentence of article 1 (a): to keep the wording already chosen by the Committee, namely: "however, a person shall not be considered an operator whenever he is a carrier"; to return to the original wording used in the Commission's text (A/CONF.152/5), thus reopening the discussion on the paragraph; or, finally, to replace the general reference to "a carrier" by a more complex formulation proposed by the Japanese delegation (A/CONF.152/C.1/L.19).

3. Mr. OCHIAI (Japan), introducing his delegation's proposal (A/CONF.152/C.1/L.19), said that the main difference between it and the original text concerned the treatment of stevedores. The proposal would make it clear that stevedores were included within the scope of the Convention, as most members of the Committee wished, regardless of any so-called "Himalaya" clause in the bill of lading. In the original text, it was unclear whether stevedores were included. A second reason for the proposal was the notorious difficulty of defining the "carrier". The words "under applicable rules of law governing carriage" resolved that difficulty.

4. The CHAIRMAN noted that the aim of the Japanese proposal was to exclude the effects of the "Himalaya" clause: even if a stevedore was covered by the Himalaya clause, he would be covered by the Convention. Under the existing text, in his view, stevedores were covered by the Convention, but there might be a problem of interpretation in that connection.

5. Miss VAN DER HORST (Netherlands) said she could not support either the original text of the last sentence of article 1 (a), or the Japanese proposal, since both used the word "responsible". In preference to either, she supported the German proposal already adopted by the Committee, according to which the last sentence of article 1 (a) would read: "However, a person shall not be considered an operator whenever he is a carrier." The result of the original wording would be that a carrier who had legally - e.g. under the Hague-Visby Rules - been exonerated from liability for the goods before loading and after unloading, could be regarded as liable under the Convention. That was the difficulty inherent in the word "responsible". She could, however, accept the Japanese proposal if the words

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"responsible for the goods" were deleted. If she had known that rejecting the proposal to define "carrier" would mean returning to the original text of article 1 (a), she would have voted for a definition of "carrier".

6. The CHAIRMAN invited the Committee to vote on the Japanese proposal (A/CONF.152/C.1/L.19).

7. There were 8 votes in favour, 8 against and 12 abstentions.

8. The proposal was not adopted.

9. The CHAIRMAN invited the Committee to vote on the proposal to restore the original text of the last sentence of article 1 (a) (A/CONF.152/5).

10. The proposal was adopted by 12 votes in favour, 8 against and 8 abstentions.

11. Mr. ROMAN (Belgium), introducing his delegation's proposal (A/CONF.152/C.1/L.61), said that its purpose was to protect the operator from being held liable in circumstances where he could not exercise any effective control.

12. The CHAIRMAN invited the Committee to vote on the Belgian proposal.

13. There were 11 votes in favour, 11 votes against and 6 abstentions.

14. The proposal was not adopted.

15. The CHAIRMAN pointed out that the Committee's decision that article 1 (a) should no longer refer to the carrier affected the scope of application of the Convention. The United States was proposing that a reference to other international conventions should be introduced in article 2 (A/CONF.152/C.1/L.7).

16. Mr. SWEENEY (United States of America) withdrew the proposal.

Article 13 (continued) (A/CONF.152/C.1/L.22)

17. Mr. MORAN (Spain) withdrew his delegation's proposal (A/CONF.152/C.1/L.22) to omit the opening phrase of article 13 (1), "Unless otherwise provided in this Convention". He had had the impression that the phrase was confusing and redundant. However, he was aware that it was a standard formula in treaty texts, and now felt that article 13 (1) was best left unaltered.

18. The CHAIRMAN observed that the phrase in question had a bearing on the waiver contained in article 6 (4), whereby the operator could agree to higher limits of liability.

19. Mr. SMITH (Australia) requested the Chairman's permission to introduce an oral proposal to insert in article 13 a new paragraph 1 bis, which arose out of the debate at the previous meeting.

20. The CHAIRMAN, while pointing out that it was contrary to the rules of procedure to introduce an oral amendment, invited the representative of Australia to explain his proposal.

21. Mr. SMITH (Australia) explained that his proposal was intended to resolve a difficulty of interpretation concerning the inclusion of stevedores within the scope of the Convention. He had earlier referred to the differing jurisprudence on the matter as between the United States and Australia or the United Kingdom, for example. In the Australian view, stevedores were of course covered by the Convention even when covered by clauses in a bill of lading. But to rule out any possible doubt on the subject he would propose a new paragraph 1 bis, stating that the operator could not exculpate himself from any liability he might have under any maritime or other bill of lading governing the carrier. At most, a stevedore would benefit from the legal protection available to a carrier; he would not escape all liability. The proposed text was: "The operator shall not be exculpated from his liability under any maritime or other bill of lading governing carriage".

22. Mr. LARSEN (United States of America) said that in the United States, as a matter of policy, the operator was not able to exculpate himself from liability. His delegation therefore had no objection whatsoever to Australia's proposal and would vote in favour of it.

23. The CHAIRMAN asked whether there were any objections to voting on the Australian proposal.

24. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that as the proposal had been made orally, his delegation needed more time to consider it.

25. Mr. ZHAO Chengbi (China) agreed with the representative of the Soviet Union. The draft Convention had been worked out over a number of years and if such changes were introduced at the present stage, there could be serious consequences. The Committee should not take a vote on the Australian proposal immediately.

26. Mr. STURMS (Netherlands) said that the Australian proposal appeared to be open to two interpretations: either it meant that the bill of lading could not depart from the Convention or that the operator could not be exonerated by the Convention from the bill-of-lading clauses.

27. The CHAIRMAN suggested that the representative of Australia should submit his proposal in writing to the plenary.

28. He took it that the Committee wished to approve article 13 as it stood.

29. It was so decided.

Article 20 (A/CONF.152/C.1/L.30, L.59, L.60)

30. Miss VAN DER HORST (Netherlands), introducing her delegation's proposal (A/CONF.152/C.1/L.59), said that the draft Convention applied to terminal operators handling goods involved in international carriage by sea, air, road and inland waterways. There were a wide variety of operators dealing with different types of goods and performing different types of services. Furthermore, those operators represented a wide range of technical and operational sophistication. In view of those circumstances, her Government was not convinced that the different branches of terminal operators should necessarily be governed by the same liability system. For instance, according to article 5 of the draft Convention, liability was based on the principle of presumed fault or neglect. Because of the many differences in the terminal operating industry, it would in many cases, for certain kinds of operators, be very difficult if not impossible to prove that they were not liable.

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In practice, many operators handled huge amounts of widely varying goods without being in a position to assess their condition and quality. It was also difficult for them to determine in advance what measures should be taken, since documents did not always adequately reveal the specific nature of individual goods. Operators could not be expected to possess sufficient knowledge of all the goods received to allow appropriate measures to be taken in all cases. Although the draft Convention should result in improvements in some branches of the terminal industry, her Government wished to have the opportunity to ratify the Convention with the reservation that the rules were only applicable to certain types of terminal operators, depending on specific circumstances in the industry.

31. Mr. INGRAM (United Kingdom) expressed support for the Netherlands proposal. His delegation had frequently referred to the problems that might arise if insurance was not available. The Netherlands proposal might mean that operators who could not get insurance if the Convention was applied to them could be excluded from the application of the Convention in their country. If so, it would give the Convention some chance of acceptance by more countries.

32. Mr. RUSTAND (Sweden) said that while his delegation respected the thinking behind the Netherlands proposal, it considered it more important to maintain the uniform character of the Convention. If the Conference were to agree that the Convention would not apply to certain types of terminal operators, the result could be that each individual country would be able to decide for itself on the sort of terminal to which the Convention would apply.

33. The CHAIRMAN invited the Committee to vote on the Netherlands proposal (A/CONF.152/C.1/L.59).

34. The Netherlands proposal was rejected by 18 votes to 5, with 10 abstentions.

35. Mr. ROMAN (Belgium), introducing his delegation's proposal (A/CONF.152/C.1/L.30), said that it had been submitted for the same reasons as those given by the Netherlands, but was narrower in scope.

36. The CHAIRMAN invited the Committee to vote on the Belgian proposal (A/CONF.152/C.1/L.30).

37. The proposal was rejected by 21 votes to 3, with 7 abstentions.

38. Mr. SAFARIAN NEMATABAD (Islamic Republic of Iran), introducing his delegation's proposal (A/CONF.152/C.1/L.60), said that it was aimed at encouraging the largest possible number of countries to ratify the Convention. While his delegation hoped that States would accede fully and without reservations, recognition of the right of reservation would make it possible for some States which might have legal problems with certain provisions of the draft Convention to become parties to it. The proposal highlighted the contradiction in certain areas, such as article 12, between the Convention and national law, particularly in countries which had adopted the Islamic legal system. In order that the right of reservation should not limit the scope of application of the draft Convention, the proposal made specific reference to article 19 of the Vienna Convention on the Law of Treaties, which was intended to defend and preserve the main purpose of any given Convention.

39. The CHAIRMAN invited the Committee to vote on the proposal (A/CONF.152/C.1/L.60).

40. The proposal was rejected by 23 votes to 2, with 7 abstentions.

41. Article 20 was approved.

Proposal for new article (A/CONF.152/C.1/L.48)

42. Mr. INGRAM (United Kingdom), introducing his delegation's proposal (A/CONF.152/C.1/L.48), said that it was usual in liability conventions to have an article specifying where a claimant might sue, the purpose being to avoid differing national rules as to when a court might hear a case. Such a provision assisted a claimant in giving him the certainty that certain courts would hear a case and also assisted the operator, or defendant, in that he would know that he could only be sued in a limited number of jurisdictions. That seemed particularly important in the draft Convention, which had left much to national law and contained a number of uncertainties.

43. The most appropriate place for litigation on matters arising from the Convention was where the damage occurred or, as the draft Convention put it, where the transport-related services were performed. The United Kingdom proposal provided a further option to cater for cases where the defendant might have only a small operation in the country where the damage occurred. However, where the transport-related services of the operator were performed in one place only, the courts of that State should be the chief place of litigation.

44. Lastly, States whose port authorities were public bodies might not wish them to be sued in any State party to the Convention, in view of the risk that some courts would award high damages, breaking the limitation of liability, and then seek to enforce the award against the State itself. Without an article such as that proposed, the mere fact that a State was party to a Convention might be regarded by the courts of some countries as giving them jurisdiction, with the risks already referred to. The United Kingdom proposal seemed a useful safeguard and he accordingly commended it to the Committee. The final wording could be left to the Drafting Committee, as could the task of ensuring that it was correctly aligned with article 2.

45. The CHAIRMAN reminded the Committee that rules of jurisdiction and competence had been debated at length in the Working Group, which had decided against them because of the large number of existing conventions, both bilateral and multilateral, on the subject, notably the Brussels and Lugano Conventions.

46. Mr. TARKO (Austria) said that his delegation was unable to support the proposal because of the number of international conventions on the subject. If such a clause were inserted, others would be required on recognition and enforcement, and that would only complicate the draft Convention.

47. Mr. LEBEDEV (Union of Soviet Socialist Republics) confirmed that the inclusion of an article on competent jurisdiction had been discussed during the preparatory work on the draft Convention. At the time Soviet experts had been in favour of it, but the majority of members of the UNCITRAL Working Group had decided against. It would thus be difficult to reopen the issue, and all the more so in view of the imperative and exhaustive nature of the United Kingdom proposal, which excluded all possibility of bringing actions before any court other than those which it enumerated, and seemed also to exclude the possibility of recourse to arbitration.

48. Mr. PAMBOU-TCHIVOUNDA (Gabon) suggested that since article 12 (1) implied that the institution of judicial proceedings was possible, there might be some merit in the United Kingdom proposal, which addressed itself to the practical aspects of such an eventuality.

49. Mr. ZHAO Chengbi (China) observed that the question of competent jurisdiction was complicated firstly by the fact that the operators of transport terminals were involved with several different modes of transport, and secondly by the fact that the rules of jurisdictional competence were not the same in all States. It would be hard to achieve the uniformity that seemed to be the purpose of the United Kingdom proposal, which did not provide for arbitration. For those reasons, his delegation could not support the proposal.

50. Mr. INGRAM (United Kingdom) withdrew the proposal.

Article 5 (continued) (A/CONF.152/C.1/L.49)

51. The CHAIRMAN called attention to the proposal submitted by Morocco (A/CONF.152/C.1/L.49). Noting that no Moroccan representative was present in the room to introduce the proposal, he said it would be difficult for the Committee to discuss it under those circumstances.

Article 12 (continued) (A/CONF.152/C.1/L.58)

52. The CHAIRMAN called attention to the Egyptian proposal (A/CONF.152/C.1/L.58). It had been submitted to the Secretariat after the normal deadline and too late for consideration during the Committee's discussion of the article. The representative of Egypt was, of course, at liberty to submit the proposal to the plenary meeting.

53. Mr. SOLIMAN (Egypt) said that since the proposal was one of wording, his delegation intended to submit it without delay for the consideration of the Drafting Committee.

54. The CHAIRMAN declared that the Committee had completed the substantive part of its work.

The meeting rose at 4 p.m.